Muhammed Shareef bin Mohamed Sagubar v Tetuan Idris & Associates and another case

HIGH COURT (PENANG) — CIVIL APPEAL NOS PA-12ANCVC-42–12 OF 2020 AND PA-12ANCVC-44–12 OF 2020

WONG HOK CHONG JC

16 NOVEMBER 2021

Civil Procedure — Striking out — Appeal — Appeal against court's decision in dismissing application to strike out statement of claim — Appeal against court's decision in allowing application to strike out statement of defence — Whether defence was scandalous, frivolous, and vexatious and an abuse of process of court — Whether there was merit in application to strike out statement of claim — Rules of Court 2012 O 18 r 19(1)(b) & (d)

Legal Profession — Remuneration — Bill of costs — Whether bill had become final and payable because defendant did not petition to tax the bill — Whether oral agreement on legal fees was champertous and contrary to s 112 of the Legal Profession Act 1976 — Whether plaintiff as solicitor was not entitled to any fees due to champertous oral agreement — Legal Profession Act 1976 s 112

There were two appeals in the present case. Appeal No 42 was an appeal against the decision of the sessions court judge ('the SCJ') in dismissing the defendant's application to strike out the plaintiff's amended statement of claim pursuant to O 18 r 19(1)(b) and/or (d) of the Rules of Court 2012 ('the ROC'). Appeal No 44 was an appeal against the SCJ's decision in allowing the plaintiff's application to strike out the defendant's statement of defence and to enter judgment against the defendant pursuant to O 18 r 19(1)(b) and/or (d) of the ROC. The relevant facts were that the defendant had engaged the plaintiff as solicitors to act for them in a suit against MBSB ('the suit'). There was an oral agreement that the legal fees to be paid by the defendant to the plaintiff would be 30% from the damages awarded by the court in the said suit ('the oral agreement'). The plaintiff then discharged themselves as solicitors for the defendant pending the conclusion of the suit and issued a bill amounting to RM98,887.80 ('the bill'), the computation of which premised on the work done and not the oral agreement. The plaintiff argued that the defendant did not petition to tax the bill, as such, the bill had become final and payable. The defendant argued that the oral agreement was champertous and ran afoul of s 112 of the Legal Profession Act 1976 ('the LPA'). The defendant further submitted that as long as there was an agreement on fees that was champetous, the plaintiff was not only disentitled to the agreed fees but to any fees

whatsoever ie not even reasonable fees for work done. In support of this submission, the defendant relied on the case of *In Re Trepca Mines Ltd (No 2)* [1963] Ch 199 ('Trepca Mines'). Based on *Trepca Mines*, the defendant submitted that it was the plaintiff's statement of claim that should be struck off and not the defendant's defence.

Held, dismissing both the appeals, and upholding the SCJ's decisions:

(1) The proposition in *Trepca Mines*, an English case, did not reflect the legal position in Malaysia in two material aspects: (a) in Malaysia, any challenge to the quantum of the legal fees must be made pursuant to the provisions of the LPA, failing which the fees were '… final and payable. It cannot be disputed or challenged' (see *Tetuan Kang & Kang v Kirana Studio Sdn Bhd*), in other words, the defendant was estopped from challenging the fees at this stage of the proceedings; and (b) in Malaysia, the fact that there might have been a champertous agreement on the issue of fees did not negate the plaintiff's appointment as solicitor or their right to receive reasonable fees for work done as was held in *Mokhtar Ngah & Co lwn Yee Seng Plantations Sdn Bhd* (see paras 15–18).

(2) The defendant did not petition to tax the bill, as such, it had become final and payable. The bill could not be disputed or challenged. Further, the plaintiff's fee was not premised on the purported champertous oral agreement but was computed based on work done. They were entitled to reasonable fees for work done, notwithstanding that there might have been in existence a champertous oral agreement (see paras 19–20).

(3) Based on the above findings, the court held that there was a clear case that the defendant's defence was scandalous, frivolous, and vexatious and an abuse of process of the court and that it should be struck out and judgment entered against the defendant. Premised on the same findings, there was no merit to the defendant's application to strike out the plaintiff's statement of claim (see paras 21 & 24).

[Bahasa Malaysia summary

Terdapat dua rayuan dalam kes ini. Rayuan No 42 ialah rayuan terhadap keputusan hakim mahkamah sesyen ('HMS') yang menolak permohonan perayu untuk membatalkan penyataan tuntutan terpinda oleh responden menurut A 18 k 19(1)(b) dan/atau (d) Kaedah-Kaedah Mahkamah 2012 ('KKM'). Rayuan No 44 adalah rayuan terhadap keputusan HMS yang membenarkan permohonan responden untuk membatalkan pernyataan pembelaan perayu dan untuk membuat penghakiman terhadap perayu menurut A 18 k 19(1)(b) dan/atau (d) KKM. Fakta yang berkaitan ialah perayu telah melantik responden sebagai peguamcara untuk bertindak bagi pihak mereka dalam saman terhadap MBSB ('saman tersebut'). Terdapat perjanjian lisan bahawa bil yang perlu dibayar oleh perayu kepada responden

adalah 30% daripada ganti rugi yang diberikan oleh mahkamah dalam saman tersebut ('perjanjian lisan tersebut'). Responden kemudian menarik diri daripada menjadi peguam cara bagi pihak perayu sebelum penyelesaian saman tersebut dan mengeluarkan bil berjumlah RM98,887.80 ('bil tersebut'), yang pengiraannya berdasarkan kerja yang dilakukan dan bukan perjanjian lisan tersebut. Responden berhujah bahawa perayu tidak membuat petisyen untuk penetapan bil, oleh itu, bil tersebut telah menjadi muktamad dan perlu dibayar. Perayu berhujah bahawa perjanjian lisan tersebut tidak sah dan bercanggah dengan s 112 Akta Profesion Undang-Undang 1976 ('APUU'). Perayu seterusnya berhujah bahawa selagi terdapat perjanjian mengenai yuran guaman yang tidak sah, responden bukan sahaja tidak berhak untuk yuran guaman yang dipersetujui tetapi untuk apa-apa bayaran sekalipun iaitu tidak juga berhak terhadap bayaran yang sewajarnya bagi kerja yang dilakukan. Bagi menyokong penghujahan ini, perayu bergantung pada kes *In Re Trepca Mines Ltd (No 2)* [1963] Ch 199 ('Trepca Mines'). Berdasarkan *Trepca Mines*, perayu berhujah bahawa pernyataan tuntutan responden yang harus dibatalkan dan bukannya pembelaan perayu.

Diputuskan, menolak kedua-dua rayuan dan mengesahkan keputusan HMS:

(1) Cadangan dalam kes Inggeris *Trepca Mines*, tidak menggambarkan kedudukan undang-undang di Malaysia dalam dua aspek material: (a) di Malaysia, apa-apa cabaran terhadap kuantum yuran guaman mesti dibuat menurut peruntukan APUU, yang mana kegagalan akan menyebabkan yuran tersebut menjadi '... final and payable. It cannot be disputed or challenged' (lihat *Tetuan Kang & Kang v Kirana Studio Sdn Bhd*, dengan kata lain, perayu telah dihalang daripada mencabar yuran guaman tersebut pada peringkat prosiding ini; dan (b) di Malaysia, hakikat bahawa terdapat perjanjian yang tidak sah dalam isu yuran guaman tidak menafikan pelantikan responden sebagai peguam cara atau hak mereka untuk menerima bayaran yang munasabah untuk kerja yang telah dilakukan seperti yang diputuskan di dalam kes *Mokhtar Ngah & Co lwn Yee Seng Plantations Sdn Bhd* (lihat perenggan 15–18).

(2) Perayu tidak membuat petisyen untuk penetapan bil, oleh itu, ia telah menjadi muktamad dan perlu dibayar. Bil tersebut tidak boleh dipertikaikan atau dicabar. Selanjutnya, yuran guaman responden bukanlah berdasarkan perjanjian lisan tersebut yang dikatakan sebagai tidak sah tetapi dikira berdasarkan kerja yang telah dilakukan. Mereka berhak mendapat bayaran yang sewajarnya untuk kerja yang telah dilakukan, walaupun mungkin wujud perjanjian lisan yang tidak sah (lihat perenggan 19–20).

(3) Berdasarkan dapatan-dapatan di atas, mahkamah memutuskan bahawa terdapat kes yang jelas bahawa pembelaan perayu adalah berunsur skandal, remeh, dan menyusahkan serta penyalahgunaan proses

mahkamah dan bahawa ia harus dibatalkan dan penghakiman dibuat terhadap perayu. Berdasarkan dapatan-dapatan yang sama, tiada merit dalam permohonan perayu untuk membatalkan pernyataan tuntutan responden (lihat perenggan 21 & 24).]

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)
Mastika Jaya Timber Sdn Bhd v Shankar a/l Ram Pohumall [2010] 5 MLJ 707; [2010] 10 CLJ 312, HC (refd)
Mokhtar Ngah & Co lwn Yee Seng Plantations Sdn Bhd [2014] MLJU 1937; [2009] 10 CLJ 348, HC (refd)
SP Veloo & Co v Affin Bank Bhd [2017] MLJU 1042; [2017] 1 LNS 1041, CA (refd)
Tetuan Kang & Kang v Kirana Studio Sdn Bhd [2007] MLJU 896; [2015] 1 CLJ 431, HC (refd)
Trepca Mines Ltd (No 2), In Re [1963] Ch 199, CA (not folld)

Legislation referred to

Legal Profession Act 1976 ss 112, 118, 124, 126, 128
Rules of Court 2012 O 18 r 19(1), (1)(b), (1)(d)

Ravin Mohanraj Vello (Erneetha Kaur a/p Baghwant Singh with him) (Vello & Assoc) for the defendant.
Fathima bt Mohd Idris (Idris & Assoc) for the plaintiff.

Wong Hok Chong JC:

INTRODUCTION

[1] These are two appeals emanating from the same sessions court suit:

(a) Appeal No 42 is the defendant's appeal against the learned sessions court judge's ('SCJ') decision to dismiss the defendant's application to strike out the plaintiff's amended statement of claim pursuant to O 18 r 19(1)(b) and/or (d) of the Rules of Court 2012 ('the RC') (encl 26 in the sessions court); and

(b) Appeal No 44 is the defendant's appeal against the SCJ's decision to allow the plaintiff's application to strike out the defendant's amended defence and to enter judgment against the defendant pursuant to O 18 r 19(1)(b) and/or (d) of the the RC (encl 22 in the sessions court).

[2] They concerned the same issues and were heard together. After hearing both parties' submissions, I dismissed both appeals and upheld the SCJ's decisions. These are the grounds of my decision.

A BACKGROUND

[3] The defendant engaged the plaintiff as solicitors to act for them to sue MBSB in a civil suit ('MBSB Suit'). According to the defendant, there was an oral agreement between the parties that the legal fees to be paid would be 30% of the damages that the court awarded to the defendant in the MBSB Suit ('oral agreement').

[4] Subsequently, the plaintiff discharged themselves as solicitor for the defendant in the MBSB Suit before the conclusion of the matter. They then issued a bill on 19 September 2018 for RM98,887.80 ('bill'). The computation of the bill was premised on the work done and not the oral agreement. In any event, the oral agreement would have been otiose given that the MBSB Suit had yet to be concluded, and damages had yet to be awarded, at the material time. After the bill was issued, the defendant did not petition for an order for the bill to be taxed ('petition').

THE PLAINTIFF'S ARGUMENT

[5] According to the plaintiff, the bill became statutorily final and payable when the one-year timeframe for the defendant to petition lapsed. Hence, the plaintiff was claiming for the payment of their professional legal fees under the bill that had become final and indisputable.

[6] Under s 124 of the Legal Profession Act 1976 ('the LPA'), the contents of the Bill are presumed correct until the contrary is shown:

> 124 No advocate and solicitor to sue for costs until delivery of bill of cost
>
> (1) ...
>
> (2) Where a bill is proved to have been delivered in compliance with subsection (1) it shall not be necessary in the first instance for the advocate and solicitor to prove the contents of the bill and it shall be presumed until the contrary is shown to be a bill bona fide complying with this Act.

[7] And in *SP Veloo & Co v Affin Bank Bhd* [2017] MLJU 1042; [2017] 1 LNS 1041, the Court of Appeal held as follows in respect of s 124 of the LPA:

> [22] As we have stated earlier that a solicitor's bill of costs has special protection by statute and s 124 gives the protection. It does not require the solicitor to prove the contents and it shall be presumed until the contrary is shown a bill bona fide complying with this Act ...

[8] The defendant is entitled to challenge the bill by petitioning for it to be taxed within six months of the issuance of the bill or, where there are special circumstances, after six months but within one year of the issuance of the bill. The relevant parts of ss 126 and 128 of the LPA provides as follows:

> 126 An order for taxation of costs to be made within 6 months of delivery of bill of costs
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> (1) An order for the taxation of a bill of costs delivered by any advocate and solicitor may be obtained by a petition as a matter of course by the party chargeable therewith, or by any person liable to pay the cost either to the party chargeable or to the advocate and solicitor, at any time within six months from the delivery of the bill, or, by the advocate and solicitor after the expiration of one calendar month, and within a year from, the delivery ...
>
> 128 Order for taxation of advocate and solicitor's bill on notice given
>
> (1) After the expiration of six months from the delivery of a bill of costs, or after payment of the bill of costs, no order shall be made for taxation of a solicitor's bill of costs, except upon notice to the advocates and solicitors and under special circumstances to be proved to the satisfaction of the Court.
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> (2) No such order for taxation shall in any event be made after the expiry of one year from the delivery of the bill of costs.

[9] The High Court in *Tetuan Kang & Kang v Kirana Studio Sdn Bhd* [2015] 1 CLJ 431 ('Kang & Kang') in addressing these statutory provisions, explained that if the client fails to petition for the bill to be taxed within the stipulated timeframe, the bill then becomes final and payable:

> [32] The next issue has to do with whether the defendant has lost its right to challenge the amount claimed in the invoice. The invoice in the present case is a gross sum bill. The sessions court judge had in reliance on *HMJ Shaharom* permitted the defendant to challenge the quantum claimed by the plaintiffs, although the period during which it may apply for taxation had expired at the material time.
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> [33] The question arises, was whether the judge is correct in so doing. An invoice delivered by a solicitor to his client becomes a bona fide bill by virtue of the rebuttable presumption encapsulated in s 124(2) of the LPA. The presumption is triggered in the absence of any objection or challenge to the solicitor's bill. The bill is valid for the purposes of s 124. The client has one year from the date of delivery of the bill to tax the bill if he disputes the amount claimed. If the client does not avail himself of this procedure, his remedy under the LPA to challenge the bill is extinguished by s 128(2) of the LPA. This provision provides that the power to order an assessment shall not be exercisable on an application made by the client after the expiration of twelve months from the delivery of the bill. No taxation outside this period is permissible.
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> [34] Turning to the facts in this instant case. The defendant did not seek taxation of

the invoice at any point in time and the period mentioned in s 128(2) of the LPA has expired. By operation of the statutory prohibition in s 128(2), the amount claimed in the invoice has become final and payable. It cannot be disputed or challenged.

THE DEFENDANT'S ARGUMENT

[10] The defendant says that the oral agreement is champertous and runs afoul of s 112 of the LPA. The relevant part of s 112 of the LPA provides as follows:

> 112 No advocate and solicitor to purchase interest of client
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> (1) Except as expressly provided in any written law, or by rules made under this Act, no advocate and solicitor shall —
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> (a) purchase or agree to purchase either directly or indirectly an interest or any part of the interest which is the subject matter of his client or that of the other party in the same suit, action or other contentious proceeding brought or to be brought or maintained; or
>
> (b) enter into any agreement by which he is retained or employed to prosecute any suit or action or other contentious proceeding which stipulates for or contemplates payment only in the event of success in such suit, action or proceeding ...

[11] The case law further illuminates this statutory provision. In *Mastika Jaya Timber Sdn Bhd v Shankar a/l Ram Pohumall* [2010] 5 MLJ 707; [2010] 10 CLJ 312, the High Court held as follows:

> [14] Under s 112 of the Legal Profession Act 1976 which is applicable in West Malaysia, no advocate shall enter into any agreement which stipulates for or contemplates payment only in the event of success in such suit, action or proceeding. There is no similar provision in the Sarawak Advocate Ordinance. However, the common law definition of champerty includes such agreements. In *Re Attorney And Solicitor Act 1870* (1875) 1 Ch D 573 (cited in *Mokhtar Ngah & Co lwn Yee Seng Plantations Sdn Bhd* [2009] 10 CLJ 348), Jessel MR said that a statutory provision that invalidated any agreement which stipulates for or contemplates payment only in the event of success in such suit, action or proceeding is meant to provide against champerty (see also *Aratra Potato Co Ltd v Taylor Joynson Garrett (a firm)* [1995] 4 All ER 695 and *Wallersteiner v Moir (No 2)* [1975] QB 373 that were cited by counsel for defendant). Maintenance and champerty are not actionable torts in England since 1997. However they can still be applied to declare an agreement void on the ground of public policy (see the judgment of James Foong FCJ in *Quill Construction Sdn Bhd v Tan Hor Teng & Anor* [2006] MLJU 120; [2006] 2 CLJ 358). As a champertous agreement, the alleged oral agreement is illegal and against public policy. Therefore, the plaintiff in this case cannot maintain this action. On this ground as well it is pointless to allow the case to go to a full trial as the plaintiff would not be able to enforce the so called oral collateral agreement even if it is proved.

[12] The defendant further says that, as long as there was an agreement on fees that was champertous, the plaintiff is not only disentitled to the agreed fees but to any fees whatsoever — not even reasonable fees for work done.

[13] In support of this contention, he referred the court to an English authority, *In Re Trepca Mines Ltd (No 2)* [1963] Ch 199 ('Trepca Mines') where it was held as follows:

> Held — ...
>
> (2) That when a solicitor was retained to conduct litigation on the ordinary and accustomed terms he was not debarred from acting in that litigation simply because he knew that his client had made a champertous agreement to share the proceeds with another. The solicitor was entitled to conduct the litigation to the end and to recover his proper costs for so doing unless he had in some way or other participated in the champertous agreement. There must be active participation by the solicitor in the illegal transaction before he is disentitled to his costs. Even though the solicitor was not a party to the champertous agreement, nevertheless, if he was an active participator, in the sense that he voluntarily did a positive act to assist to implement the unlawful agreement, then he could not recover; by rendering positive assistance he became guilty of aiding and abetting the offence (post, pp 220, 230). S had been actively participating in the champertous agreement between P and T and, accordingly, he was not entitled to recover his taxed costs.

[14] It was on the strength of *Trepca Mines* that the defendant says that it is the plaintiff's statement of claim that should be struck off and not the defendant's defence.

THE COURT'S VIEW

[15] However, I found that the proposition in *Trepca Mines*, an English case, did not reflect the legal position in Malaysia in at least two material aspects.

[16] First, in Malaysia, any challenge to the quantum of the legal fees must be made pursuant to the provisions of the LPA; failing which, the fees is '... final and payable. It cannot be disputed or challenged' (see *Kang & Kang*). In other words, the defendant is estopped from challenging the fees at this stage of the proceedings.

[17] Second, in Malaysia, the fact that there may have been a champertous agreement on the issue of fees does not negate the plaintiff's appointment as solicitor or their right to receive reasonable fees for work done.

[18] This was so held by the High Court in *Mokhtar Ngah & Co lwn Yee Seng Plantations Sdn Bhd* [2009] 10 CLJ 348 ('Mokhtar Ngah'), where the solicitors had sought to enforce a fee agreement under s 118 of the LPA. The

court after finding it void for being champertous, went on to direct fees be taxed. Justice Ahmad Maarop (as he then was) held as follows:

> [25] ... Jadi, pada hemat saya, tidak kira situasi mana yang akan berlaku, (sama ada situasi yang menghasilkan jumlah/nilai penghakiman atau situasi yang menghasilkan jumlah/nilai yang dipersetujui), adalah jelas bahawa plaintif akan menerima habuannya pada kadar satu pertiga, hanya jika kejayaan dicapai oleh defendan terhadap Pihak Berkuasa Negeri Terengganu di dalam kes-kes yang melibatkan kedua-dua konsesi tersebut. Oleh itu berdasarkan kepada otoriti-otoriti yang telah saya rujuk, tiada keraguan di fikiran saya dan saya memutuskan bahawa perjanjian saraan tersebut adalah perjanjian champerty dan/atau bertentangan dengan peruntukan di bawah s 112(1)(b) Akta 166.
>
> [50] Berdasarkan kepada huraian yang telah dibuat, mahkamah memerintahkan supaya perjanjian saraan tersebut dan juga authority/warrant to act tersebut diserahkan untuk pembatalan (*cancellation*). Selanjutnya, mahkamah ini memerintahkan supaya apa-apa kos, fee dan perbelanjaan yang dikatakan telah dibuat dan ditanggung mengenai perkara-perkara yang termasuk dalam dokumen-dokumen tersebut hendaklah ditaksirkan (*taxed*) dengan cara yang sama dan menurut kaedah-kaedah yang sama seolah-olah dokumen-dokumen tersebut tidak dibuat, seperti yang diperuntukkan di bawah s 118(3) Akta 166.

FINDING

[19] In the instant case, the defendant did not petition to tax the bill. It has thus become final and payable; it cannot be disputed or challenged (*Kang & Kang*).

[20] Further, the plaintiff's fee here is not premised on the purported champertous oral agreement, but is computed based on work done. They are entitled to reasonable fees for work done, notwithstanding that there may have been in existence a champertous oral agreement (*Mokhtar Ngah*).

ORDER 18 R 19 OF THE RC

[21] In the premise, I agree with the plaintiff that this is a clear case that the defendant's defence is scandalous, frivolous and vexatious and an abuse of process of the court; and that it should be struck out and judgment entered against the defendant.

[22] Order 18 r 19(1)(b) and (d) of the RC provides as follows:

> 19 Striking out pleadings and endorsements (O 18 r 19)
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> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —

(a) ...

(b) it is scandalous, frivolous or vexatious;

(c) ...

(d) it is otherwise an abuse of the process of the Court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[23] In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7, the Supreme Court held as follows:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86, p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (*Attorney-General of Duchy of Lancaster v L & NW Ry Co* [1892] 3 Ch 274 CA).

[24] Conversely, premised on the same findings, there was no merit to the defendant's application to strike out the plaintiff's statement of claim pursuant to O 18 r 19(1)(b) and/or (d) of the RC.

DECISION

[25] For the above reasons, I dismissed both: (a) Appeal No 42 (The defendant's appeal against the SCJ's decision to dismiss the defendant's application to strike out the amended statement of claim); and (b) Appeal No 44 (the defendant's appeal against the SCJ's decision to allow the plaintiff's application to strike out the defence and enter judgment); and upheld the SCJ's decisions.

Both appeals dismissed; SCJ's decision upheld.

Reported by Dzulqarnain Ab Fatar